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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 173

GARNETT R. DAVIS, *Petitioner*

v.

THE TENNESSEE VALLEY AUTHORITY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on March 1, 1963.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 69) is printed in Appendix A hereto, infra p. 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 1, 1963 (R. 69). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the granting of a Motion for Summary Judgment based on a defense of laches is not a denial of due process of law when the record reflects a material fact to be in controversy and when the veracity of the moving party has been questioned in an affidavit filed in opposition to said motion for summary judgment.

STATUTE INVOLVED

The statutory provision involved in Section 14 of the Veteran's Preference Act of 1944, as amended, 5 U.S.C. 851 et seq.

STATEMENT

This is a case of alleged inefficiency in job performance relative to work performed by petitioner as far back as 1952. Prior to the filing of the letter of charges proposing the dismissal of the petitioner, which letter was dated May 10, 1956, he had been employed by the respondent in a satisfactory manner. The letter of charges covered matters dating back some four years to the year 1952, which matters had not been presented to petitioner prior to 1956 as being the basis of any allegation of inefficiency on his part. Petitioner properly appealed his proposed dismissal within the Agency and a Grievance Hearing was held thereon on June 8, 1956, which resulted in a decision adverse to him. He then appealed his proposed dismissal to the United States Civil Service Commission which refused to decide the merits of the proposed discharge due to the respondent not having followed correct procedure in effecting the dismissal of the petitioner.

Following the determination of the Civil Service Commission that the proposed dismissal was procedurally defective, the respondent corrected its procedural error and changed the proposed removal date to February 6, 1957, said change being contained in a letter dated February

4, 1957. Petitioner subsequently pursued all avenues of administrative appeal available to him without any satisfaction being obtained, the last such appeal being a determination made by respondent on June 12, 1958, which was a denial to appellant of pay for unused leave and a statement that the same had been forfeited. Following this last recourse to the respondent, the petitioner caused a suit to be filed in the United States Court of Claims on June 12, 1959, which suit was dismissed on the grounds that said Court had no jurisdiction over the matter said dismissal occurring on June 17, 1960. On May 10, 1961, suit was filed in the United States District Court for the Northern District of Alabama, which suit was dismissed by the granting of a motion for summary judgment based on a defense of laches and failure to join an indispensable party. Petitioner subsequently appealed this decision to the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the lower Court on March 1, 1963.

REASONS FOR GRANTING THE WRIT

Denial of an opportunity to present a factual defense to the defense of laches as propounded by the respondent herein is a denial of due process of law. The arbitrary action of the Trial Court below in granting motion for summary judgment to respondent is contrary to the basic principle of law that a motion for summary judgment will lie only if there is no material issue of fact in controversy. In the instant matter the petitioner in his affidavit in support of his opposition to the motion for summary judgment set forth material issues of fact which were in controversy and attacked the truthfulness of officials employed by the respondent. Wherein the veracity of parties to a suit is questioned it is submitted that only a trial of such issues before the Court can resolve the question of truthfulness. Herein officials of Respondent hid behind the cloak of affidavits which could not be cross-examined

and which were nothing more than mere scraps of paper to which they had affixed their signatures and to which they had discreetly sworn truth. Discreetly sworn to truth behind the cloak of parchment because they dare not expose themselves to an open trial of their contentions. Such perfidy is not a component of Justice nor a principle of Law to which the Constitution of the United States subscribes. Such perfidy is alien to the democratic processes of this Government and is the tool of the opposition to justice and fair play.

The Trial Court herein in granting the respondent's motion for summary judgment on the defense of laches locked the door of justice to the Petitioner and denied to him his day in Court. To have had the issues aired before the Court would not have denied to respondent the right to the defense of laches were it valid and legitimate but to have such a defense summarily set aside the rights of petitioner to be heard is a denial of due process and contrary to the Constitutional protection guaranteed to petitioner. In short, the Trial Court herein has divested the petitioner of his right to be heard in open Court and seek legal redress for a fraud perpetrated upon him in causing his dismissal from gainful employment as a Federal Employee.

Petitioner herein has exhaustively made all efforts to have this matter tried before the Courts as quickly and with as much dispatch at his command. The record submitted herewith contains a complete accounting of the exhaustive efforts of Petitioner to have a full and fair adjudication of his complaints but he has not been able to have such an adjudication administratively nor judicially and now seeks the redress afforded him by this Court in seeking a petition for a writ of certiorari. To permit a trial of the issues herein will open a sordid record of unmitigated lies which the respondent has lent itself to in order to effect the dismissal of the petitioner. It is not

the type of record to be aired public and in an open Court and the respondent has succeeded to date in keeping this record suppressed to the detriment of the petitioner and to the denial of his rights as guaranteed by the Due Process Clause of the Constitution.

The veracity of agents of Respondent is at issue herein and is questioned with great strength by Petitioner as the record reflects. To continue to permit the Respondent and its agents to deny a full and fair opportunity to be heard in open Court can only be a denial of justice and a denial to petitioner of his inalienable right to his day in Court.

The cases of *Evans* v. *Beedom*, 265 F. 2d 125 and *Arant* v. *Lane*, 249 U.S. 367, support the position of petitioner herein. Therein the doctrine of laches as a defense was set forth in all of its properties and reflected that such a defense is valid where there is a showing that the party against whom the defense is pleaded did nothing to assert his claim. In the *Evans* case, supra, the Court held that, a mere showing of a contemplation to start a legal action is sufficient to thwart the effective use of a defense of laches.

Again the attention of this Court is respectfully directed to the cases of *Baxter* v. *U. S.*, 122 C. Cls. 632; *Winsberg* v. *U. S.*, 120 C. Cls. 511; *Kaufman* v. *U. S.*, 118 C. Cls. 91; and *Simon* v. *U. S.*, 113 C. Cls. 182, which support the position of petitioner herein and are sufficient legal doctrines to defeat the defense of laches made by respondent.

The defense of laches is an equitable remedy herein and not a legal one and has for its foundation principles of justice and fair play. It was not ordained for the purpose of covering up the transgressions of the guilty but was ordained to prevent miscarriages of justice. The only purpose served by the defense of laches herein is a denial of justice to the petitioner. The sins of the respondent cemented in a foundation of deceit and perfidy have been permitted to ride the crest of the wave of fraud and blinded the eyes of justice with a tidal wave of injustice. To per-

mit such action to continue any further in this matter is to lend the Courts of this land to side of fraud and deceit.

Before a just and proper determination of the validity of respondent's claim can be established a trial of the issues must be held and if after all facts are before the Court the defense of laches prevails then petitioner will have lost his cause in a way that is the basis of our judicial system and will have had his day in Court. As the issues herein now stand no judicial resolution of the matters in dispute has taken place. An arbitrary fiat of a lower Court has permitted the falsities of the respondent to take precedence over truth. Such is not justice; such is not equity; such is not the American system of democracy at work.

Laches being an equitable remedy then the seeker of equity must do equity and the "Clean Hands Doctrine" must be applied and when so applied herein the question presented is whether the hands of respondent can ever be cleaned for the lies and deceit used to deprove the petitioner of his position of employment with the respondent. Such action is not democracy at work nor is it within the framework of fair play for this Country stands and which this Court is compelled to uphold. A summary dismissal of petitioner's cause of action herein without giving him his day in Court is a denial of his rights of appeal guaranteed by the Veterans' Preference Act and a denial of due process of law as set forth in the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN P. WITSIL
Counsel for Petitioner

May 31, 1963

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19879

GARNETT R. DAVIS, *Appellant*,

versus

THE TENNESSEE VALLEY AUTHORITY, *Appellee*.

Appeal from the United States District Court for the Northern District of Alabama.

(March 1, 1963)

Before TUTTLE, Chief Judge, POPE* and JONES, Circuit Judges.

PER CURIAM: The judgment is AFFIRMED on the able opinion of the trial court. *Davis* v. *The Tennessee Valley Authority*, No. Dist. of Ala., —F. Supp. —.

(SEAL)

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit.

By CLARA R. JAMES
Deputy

New Orleans, Louisiana May 10, 1963

* Of the Ninth Circuit, sitting by designation.

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692-313—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 173

GARNETT R. DAVIS, PETITIONER

v.

THE TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 33–42)[1] is reported at 214 F. Supp. 229. The opinion of the court appeals (Pet. App. 1a) is reported at 313 F. 2d 959.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1963. The petition for certiorari was filed on May 31, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the printed record in the court of appeals which is part of the record before this Court.

QUESTION PRESENTED

Whether, in the circumstances of this case, laches barred petitioner's suit challenging the validity of his removal from government employment.

STATEMENT

Petitioner, a veteran's preference eligible, was a Safety Engineer (Grade GS–7) employed by the Tennessee Valley Authority (TVA) until his final dismissal on February 6, 1957 (R. 34). Petitioner appealed this termination to the Fifth Regional Office of the United States Civil Service Commission. On March 7, 1957, the Regional Office sustained the termination and on August 2, 1957, the Board of Appeals and Review of the Civil Service Commission affirmed the decision of the Regional Office (R. 34). On November 8, 1957, the Chairman of the Board of Appeals and Review denied petitioner's request to reopen and reconsider his case. On June 12, 1959, petitioner filed suit in the Court of Claims for salary allegedly due as a result of his dismissal. The Court of Claims dismissed the suit in June 1960 on the ground of lack of jurisdiction.

On May 10, 1961—more than three and half years after he had exhausted his administrative remedies and 11 months after dismissal of the suit brought in the Court of Claims—petitioner brought this action against the TVA in the district court seeking a declaratory judgment that his dismissal was invalid. Petitioner, in his complaint, failed to join members of

the Civil Service Commission and the court held the action subject to dismissal for failure to join indispensable parties.[1] Leave to amend the complaint was denied on the ground that the action was, in any event, barred by laches, and summary judgment was granted dismissing the complaint.

The court of appeals affirmed *per curiam* on the authority of the opinion of the district court.

ARGUMENT

The court below correctly determined that petitioner's action was barred by laches under the principles laid down by this Court in *United States ex rel. Arant* v. *Lane*, 249 U.S. 367. In *Arant* a claim for reinstatement made less than two years after a government employee's dismissal was held barred by laches (*id.* at 372):

> Such a long delay must necessarily result in changes in the branch of the service to which [the employee] was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

Here, although petitioner's administrative remedies were exhausted when the petition to reopen his case

[1] Respondent agrees with the courts below that petitioner failed to join indispensable parties. However, since we believe that laches are a complete bar to the action, we shall confine our argument here to that issue.

was denied by the Board of Appeals and Review of the Civil Service Commission on November 8, 1957, he waited 19 months before filing an action in the Court of Claims. When this action was dismissed for lack of jurisdiction after pending for 12 months, petitioner delayed an additional 11 months before filing this action. As a result of these delays, petitioner's action, if successful, would cause serious prejudice to respondent. Petitioner was receiving an annual salary of $8,495 when dismissed (R. 24) and, if he were reinstated, he would have a claim for back salary in the amount of approximately $36,000 as of the date this action was filed and over $52,000 as of the present time.

Petitioner suggests (Pet. 5) that complete inaction by the claimant is a prerequisite for the application of the laches doctrine. In *Arant*, however, the employee asserted that he had made "every reasonable effort" to obtain restoration prior to filing suit. This Court's response was that laches was a bar because "[u]nder circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to *effectively* assert his claim for reinstatement to office for almost two years" (emphasis added). 249 U.S. at 372.

The actions petitioner took were neither prompt nor effective. He took no action whatsoever after his administrative appeal was denied until the filing of his action in the Court of Claims 19 months later. Since this suit itself could properly have been dis-

missed for laches,[3] it cannot serve as an argument against dismissing a subsequent suit for laches. Moreover, the suit was dismissed because the Court of Claims lacked jurisdiction over respondent. Since petitioner's attempt to assert his claim was defective, it is no answer to the defense of laches to the suit that was ultimately filed by petitioner in the district court. See *Jones* v. *Summerfield*, 265 F. 2d 124 (C.A. D.C.), certiorari denied, 361 U.S. 841; *Benson* v. *Zahner*, 289 F. 2d 756 (C.A. D.C.), certiorari denied, 366 U.S. 904.

Upon dismissal by the Court of Claims, petitioner waited another 11 months before filing the instant suit. In the district court, petitioner alleged that this additional delay was due to financial embarrassment. This explanation, however, does not explain the earlier delay which in itself barred any legal action. And it is settled that inability to bear the costs of litigation does not, in itself, justify delay in the assertion of a claim. *Leggett* v. *Standard Oil Co.*, 149 U.S. 287, 294; *Wolf Mineral Process Corp.* v. *Minerals Separation North American Corp.*, 18 F. 2d 483, 490 (C.A. 4), certiorari denied, 275 U.S. 558; *Gillons* v. *Shell Co.*, 86 F. 2d 600, 606 (C.A. 9), certiorari denied, 302 U.S. 689.

Nor does *Evans* v. *Leedom*, 265 F. 2d 125 (C.A. D.C.), certiorari denied, 361 U.S. 935, support petitioner's position. The court there expressly held

[3] In *Norris* v. *United States*, 257 U.S. 77, the Supreme Court held that an eleven-month delay was sufficient to constitute laches.

that mere contemplation of legal action is not a bar to the defense of laches when suit is ultimately brought. The court in *Evans* assumed that delay was excusable if an employee deferred the filing of suit to await the outcome of another case involving similar issues. Petitioner has not offered a similar justification for his delay. The Court of Claims cases to which petitioner points (Pet. 5) are equally inapposite.[4]

Petitioner asserts (Pet. 3) that respondent's motion for summary judgment should have been denied because "petitioner in his affidavit in support of his opposition to the motion for summary judgment set forth material issues of fact which were in controversy and attacked the truthfulness of officials employed by respondent." The alleged material issues of fact and the attack upon the truthfulness of respondent's officials both relate solely to the merits of the termination action taken against the petitioner (R. 29–32). The courts below, however, held that, regardless of the merits, petitioner's complaint is barred by laches. On that matter, there is no disputed issue of fact.

[4] The plaintiff in *Bigelow v. United States*, 122 Ct. Cl. 632, acted as his own attorney and relentlessly pursued his attempts at relief through the federal courts. *Winsberg v. United States*, 120 Ct. Cl. 511, involved an overtime compensation claim where delay was not prejudicial to the government since no double salary had to be paid. Intentional delay pending determination of another suit involving similar facts and issues was held, as suggested in *Evans v. Leedom* (discussed in the text above), to bar laches in *Kaufman v. United States*, 118 Ct. Cl. 91. In *Simon v. United States*, 113 Ct. Cl. 182, laches were held inapplicable to a case involving recovery of salary for the time between illegal dismissal and reinstatement.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

GOVERNMENT PRINTING OFFICE: 1963